



June 10, 2013

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Senior Policy Advisor  
DoD Sexual Assault Prevention and Response Office (SAPRO)  
c/o Federal Docket Management System Office  
4800 Mark Center Drive, East Tower, Suite 02G09  
Alexandria, VA 22350-3100

**RE: RIN 0790-AI36; Sexual Assault Prevention and Response (SAPR) Program Procedures**

Dear Ms. Rangoussis:

The American Civil Liberties Union (“ACLU”) appreciates the opportunity to submit these comments in response to the Department of Defense Sexual Assault Prevention and Response Office (“DoD SAPRO”) Interim Final Rule on Sexual Assault Prevention and Response Program Procedures, published in the Federal Register on April 11, 2013 (the “Notice”). The proposed rule will be a helpful force for change in the military. Nevertheless, it is critical to note the absence of important provisions relating to victim redress, transfer options, confidentiality protections, and data collection, all of which we hope the agency will address.

The ACLU is a non-partisan civil liberties organization with more than a half million members, countless additional activists and supporters and 53 affiliates nationwide, dedicated to the principles of individual liberty and justice guaranteed in the U.S. Constitution. For decades, the ACLU has worked not only to end discriminatory treatment within our military,<sup>1</sup> but also to prevent and respond to gender-based violence and harassment in the workplace. The ACLU also works to hold governments, employers and other institutional actors accountable so as to ensure that women and men can lead lives free from violence.

Over the last several years, Congress and the Department of Defense have grappled with sexual harassment, sexual assault and rape within the military. Although a variety of proposals have been implemented and some progress

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<sup>1</sup> Most recently, in November 2012, the ACLU initiated a lawsuit, on behalf of the Service Women Action Network and other plaintiffs, against the Department of Defense challenging the ground combat exclusion. Over the years, we have also successfully challenged military recruitment standards and military academy admissions policies that discriminated against women; fought for servicewomen to receive the same military benefits as their male counterparts; and defended the rights of pregnant servicewomen; and advocated for servicewomen’s access to reproductive health care.

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has been made to prevent and respond to sexual assault, sexual harassment and rape in the military, the problem is deeply rooted and persists.

More than 3,300 reports of sexual assault were made in FY 2012,<sup>2</sup> but we know that the incidence of sexual assault is significantly underreported. The Department estimated that more than 26,000 incidents of sexual assault occurred in 2011 alone.<sup>3</sup> While such statistics alone are alarming, the problem of military sexual assault is compounded by the perception and the reality of a military justice system that fails to mete out actual justice when sexual assault, harassment or rape is alleged.

This rule takes significant steps towards enhancing the military's responsiveness to incidents of sexual violence, outlining measured and practical objectives for meeting the wide range of legal, medical, and social service needs of assault victims. To this end, it implements policy, assigns responsibilities, and provides guidance and procedures for the SAPR Program; establishes the processes and procedures for the Sexual Assault Forensic Examination (SAFE) Kit; establishes the multidisciplinary Case Management Group (CMG) and provides guidance on how to handle sexual assault; establishes SAPR minimum program standards, SAPR training requirements, and SAPR requirements for the DoD Annual Report on Sexual Assault in the Military.

While undoubtedly ambitious in scope and detail, the rule nonetheless raises certain questions and concerns. These comments will both seek clarification and venture possible interpretations as to a variety of its provisions on victim rights and resources.

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**A. The rule should address barriers to redress for incidents of coercion, retaliation, and reprisal against victims of sexual assault.**

Among the responsibilities that the rule assigns to the Secretaries of the military departments in § 105.5 is the establishment of procedures “to protect victims of sexual assault from coercion, retaliation, and reprisal in accordance with DoDD 7050.06.” In light of its mandate to incorporate applicable recommendations from the Government Accountability Office (“GAO”), the rule should take full account of the findings of the February 2012 report entitled *Actions Needed to Improve DOD's Military Whistleblower Reprisal Program*. Victims of sexual assault who report reprisal using existing mechanisms will experience the problems outlined in that report, and thus those mechanisms must be strengthened.

According to the report, the DoD's efforts to ensure that appropriate corrective action is taken—both for complainants and against those who have retaliated against them—are hampered by disconnected investigative and remedial processes as well as the limited visibility of the

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<sup>2</sup> DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, 3 (2013), available at [http://sapr.mil/media/pdf/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://sapr.mil/media/pdf/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf)

<sup>3</sup> *Id.* at 12.

corrective actions taken.<sup>4</sup> In failing to consistently identify and track data on relief granted to aggrieved service members, the report warned, the Office of the Inspector General (“IG”) and the service Boards for the Correction of Military Records (“Boards”) have hindered oversight of important statutory protections.

Of particular concern is the finding that of the reprisal cases closed between fiscal year 2006 and the first half of fiscal year 2011, the DoD fully investigated only 29% of all cases, resulting in only 6% of all cases being substantiated and eligible for corrective action.<sup>5</sup> Moreover, only about 1 in 5 complainants with substantiated cases ultimately applied to the Boards for relief during this time period.

The report also found that even in the rare instances where allegations were fully investigated, substantiated, and submitted to the Boards for review, the Boards themselves were not consistently identifying applicants with substantiated reprisal cases as such and were, therefore, not applying the appropriate procedural privileges to their cases.<sup>6</sup> To ensure that reprisal cases are correctly identified and processed by the Boards, the report proposed actions such as modifying the form used to apply for Board relief, providing additional training for Board staff, and developing better methods for identifying substantiated cases.

These recommendations, however, will have little force in the absence of higher initial investigation rates; if only 29% of all allegations are fully investigated and only 6% are substantiated, the very size of the applicant pool drastically curtails the availability of relief. One way to correct this deficiency would be for the Secretaries to mandate that the IG conduct full investigations of all reprisal allegations and that all such investigations are subject to a legal review and documented in a formal report.

We also agree with the GAO’s recommendations for improving oversight of the reprisal investigative process through the introduction and implementation of performance metrics, the revision of investigative guidance materials, and the development of a system to monitor the status of investigations.

#### **B. The rule should give additional scrutiny to ensuring sexual assault responder confidentiality requirements.**

In recognition of the need to provide a confidential disclosure vehicle for victims who wish to access services without authorizing command or law enforcement involvement, the DoD offers a Restricted Reporting option. Accordingly, § 105.8 of the rule specifies that in cases where a victim elects Restricted Reporting, the Sexual Assault Response Coordinator (“SARC”), Victim Advocate (“VA”), and healthcare personnel may not disclose confidential communications to DoD law enforcement or command authorities.

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<sup>4</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-362, ACTIONS NEEDED TO IMPROVE DOD’S MILITARY WHISTLEBLOWER PROGRAM, 34 (2012), available at <http://www.gao.gov/assets/590/588784.pdf>.

<sup>5</sup> *Id.* at 64.

<sup>6</sup> *Id.* at 40 (Such privileges generally include: 1) direct application for corrective action may be made to the service BCMR instead of first going to a lower level of administrative appeal; 2) a 180-day deadline for the BCMR to review and the secretary of the military department concerned to render a final decision in the case, which differs from other cases processed by BCMRs; and 3) right to appeal BCMR decisions to the Secretary of Defense.).

In light of this mandate, a January 2013 GAO report proposed a series of recommendations for improving the manner in which the DOD delivers confidential health care to sexual assault victims.<sup>7</sup> Chief among them was a charge to the Assistant Secretary of Defense for Health Affairs to establish clear and uniform guidance for the confidential treatment of injuries stemming from sexual assault.

The report found that military health care providers do not have a consistent understanding of their responsibilities in caring for sexual assault victims, and that provisions in DoD medical policy can conflict at times with command policy around confidentiality of restricted reports.<sup>8</sup> These inconsistencies, it argued, undermine confidence in the restricted reporting option and deter victims from seeking medical care.

While improved training and guidance represent an important first step in ensuring the confidentiality of protected communications with first responders, these measures must be bolstered. Under current policy, the decision to take corrective action in response to improper disclosure of confidential communications and medical information is left to the discretion of the command.<sup>9</sup> While we remain concerned with the discretion afforded to commanders in these situations, DoD should consider elevating the disposition authority for disciplinary actions for victim confidentiality violations to commanders in the O-6 grade or higher, as it does with underlying sex offenses.

### **C. The rule should extend the expedited transfer option to all service members reporting incidents of sexual assault, including those who file restricted reports.**

In the majority of employment settings, employers provide employees reasonable workplace safety accommodations in response to actual or threatened sexual violence. These accommodations may include transfers, reassignment, schedule modifications, and other measures. While employers may require employees to provide certification of their victim status, this proof requirement can be satisfied by documentation from a variety of sources: not only police records, but also statements from victim services agencies, clergy members, and medical providers.<sup>10</sup> A similarly expansive eligibility threshold applies within the context of federal housing accommodations for victims.<sup>11</sup>

While U.S. statute does not limit expedited victim transfers by reporting preference, § 105.9 of the rule explicitly reserves this safety measure for service members who file unrestricted reports of sexual assault, which give rise to a criminal investigation. In order to be eligible for an

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<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-182, DOD HAS TAKEN STEPS TO MEET THE HEALTH NEEDS OF DEPLOYED SERVICEWOMEN, BUT ACTIONS ARE NEEDED TO ENHANCE CARE FOR SEXUAL ASSAULT VICTIMS (2013), available at <http://www.gao.gov/assets/660/651624.pdf>.

<sup>8</sup> *Id.* at 21.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> For examples of state and local laws, see STATE LAW GUIDE: EMPLOYMENT RIGHTS FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE, LEGAL MOMENTUM (2010), available at [www.legalmomentum.org/assets/pdfs/employment-rights.pdf](http://www.legalmomentum.org/assets/pdfs/employment-rights.pdf).

<sup>11</sup> See 42 U.S.C. § 14043e-11(c)(3) (2013).

expedited transfer, a member who makes a restricted report “must affirmatively change his or her reporting option to Unrestricted Reporting on the DD Form 2910.”

Due to privacy concerns, fear of reprisal, and other reasons, a significant number of sexual assault victims opt against reporting the crime for investigation.<sup>12</sup> For many, the benefits of a criminal investigation are offset by the rigors of an invasive, time-consuming, and potentially self-incriminating process. This decision, however, should not serve as a bar to safety accommodations, particularly for those who must live as well as work in close proximity to their perpetrators.

**D. The rule should require healthcare providers to notify sexual assault victims explicitly of the availability of emergency contraception and abortion services.**

Under § 105.11 of the rule, military healthcare providers must consult with victims, once clinically stable, regarding “[a]ssessment of the risk of pregnancy, options for emergency contraception, and any necessary follow-up care and referral services.” While we are heartened by this provision, we recommend that the rule specify explicitly that emergency contraception must be available at all military health facilities, both in the U.S. and overseas.

In addition, we propose that the rule be amended to reflect the eligibility of service members and TRICARE beneficiaries who are victims of rape or incest to receive abortion services in a military medical treatment facility (“MTF”) at no cost to them.<sup>13</sup>

**E. The rule should specify the categories of data that will be captured by the Defense Sexual Assault Incident Database.**

Since December of 2010, the ACLU has been seeking data pursuant to the Freedom of Information Act on a range of variables underlying the resolution of sexual assault reports throughout the Armed Forces.<sup>14</sup> Our goal in doing so has been to analyze the role that factors like race, gender, rank, and unit might play in the disposition of the individual cases behind the statistics released under annual reporting requirements.

Obtaining this information may well shed new light on the severity of its toll among the most vulnerable members of the military community: young people, low-ranking individuals, women of color, and others. If the backbone of our Armed Forces is its enlisted personnel, disproportionately drawn from communities of color, it behooves us to assess the degree to which this foundation is undermined by sexual violence.

While § 105.15 of the rule reiterates the stated purpose of the database to assist with “annual and quarterly reporting requirements, identifying and managing trends, analyzing risk factors or

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<sup>12</sup> See, e.g., U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION 2001: CHANGES 2000-01 WITH TRENDS 1993-2001 (2002), available at <http://www.prisonpolicy.org/scans/bjs/cv01.pdf>.

<sup>13</sup> See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 704, 126 Stat. 1632, 1800 (2013).

<sup>14</sup> See *Service Women’s Action Network v. Department of Defense: Government Records on Military Sexual Trauma*, ACLU (Apr. 25, 2013), <http://www.aclu.org/womens-rights/service-womens-action-network-v-department-defense>.

problematic circumstances, and taking action or making plans to eliminate or to mitigate risks,” it fails to specify the basis upon which it will illustrate enforcement trends and reveal risk factors.

Finally, annual DoD reporting requirements fail to take account of sexual harassment, which is even more prevalent than assault among military personnel; in one recent VA study, 90% of respondents reported sexual harassment while in the military.<sup>15</sup> In light of Defense Manpower Data Center survey findings of a correlation between incidents of assault and prior incidents of harassment,<sup>16</sup> the database should include demographic and case synopsis information on sexual harassment as well as assault.

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Thank you for considering these comments. Please feel free to contact Vania Leveille, legislative counsel at the ACLU Washington Legislative Office, at (202) 715-0806 or vleveille@dcaclu.org if you have any questions.

Sincerely,



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Vania Leveille  
Senior Legislative Counsel

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<sup>15</sup> M. Murdoch and K.L. Nichol, *Women Veterans' Experiences with Domestic Violence and with Sexual Harassment While in the Military*, 4 ARCHIVES OF FAMILY MED. 411 (1995), available at <http://www.ncbi.nlm.nih.gov/pubmed/7742963>.

<sup>16</sup> DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, VOL. 2, 3 (2013), available at [http://sapr.mil/media/pdf/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_TWO.pdf](http://sapr.mil/media/pdf/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf).